

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1916-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DEANDRA S. CARTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Reversed and cause remanded for further proceedings consistent with this opinion.*

WEDEMEYER, P.J.¹ Deandra S. Carter appeals from a judgment of conviction for possession of a controlled substance (marijuana), contrary to §§ 931.14(t), 961.01(14), and 961.41(3g)(e), STATS. Carter claims the trial court

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

erred in denying her motion to suppress evidence. She claims the arresting officers lacked reasonable suspicion necessary to justify stopping her and, therefore, the discovery of marijuana on her person was inadmissible. Because the officers in this case had no reasonable suspicion for stopping Carter, the trial court erred in refusing to suppress the evidence. This court, therefore, reverses and remands the case to the trial court with directions to suppress the evidence.

I. BACKGROUND

The facts as related by the police officers and Carter are substantially similar. At 11:25 p.m. on September 26, 1996, Milwaukee Police Officers Christopher Lugo and Steven Lelinski observed Carter walking west in the 2700 and 2800 blocks of West Burleigh Street, a known area of prostitution. They observed her walking alone in this direction for roughly one minute. Carter then paused at the corner of 2901 West Burleigh Street for ten-to-fifteen seconds. The officers did not observe her interact with any other persons.

Suspecting that Carter was a prostitute, the officers pulled their squad car alongside where she was standing. Both officers exited the vehicle and Officer Lelinski began questioning Carter. He asked whether she was prostituting and Carter said she was not. Officer Lelinski then asked if she had smoked cocaine or crack cocaine. Again, she answered in the negative. When asked if she had any cocaine or crack cocaine on her person, Carter stated she had none; but, she did admit to possessing marijuana. Carter then removed two baggies containing marijuana from her pocket. She was subsequently arrested for possession of a controlled substance.

Carter moved to suppress the evidence, claiming it was discovered consequent to an illegal seizure of her person. The trial court denied her motion. She then entered a plea of guilty. Carter now appeals.

II. ANALYSIS

Carter claims the stop was unconstitutional because the officers lacked reasonable grounds for suspicion necessary to stop her. She asserts that walking alone at night and pausing at a street corner is not sufficient to raise a reasonable suspicion that one is a prostitute. Therefore, she maintains, the officers' "seizure" of her person was unconstitutional and the subsequent discovery of the marijuana was fruit of this "poisonous tree."

The constitutionality of searches and seizures is an issue that this court determines independently. *See State v. Guzman*, 166 Wis.2d 577, 586, 480 N.W.2d 446, 448 (1992). The trial court's findings of fact in the matter are upheld unless they are clearly erroneous. *See State v. Mitchell*, 167 Wis.2d 672, 682, 428 N.W.2d 364, 368 (1992); § 805.17(2), STATS.

An officer may detain a person for an investigation if the officer has a reasonable suspicion that the individual is, was, or will be involved in criminal activity. *See Terry v. Ohio*, 392 U.S. 1 (1968). Detainments of this kind are considered "seizures" of persons and may be effected either by physical force or by a showing of authority on the part of the officer. *See id.* at 19 n.16. When determining whether a seizure occurred, courts apply a reasonable person test: if a reasonable person would have believed he was not free to leave, then a seizure has occurred. *See State v. Kramar*, 149 Wis.2d 767, 781, 440 N.W.2d 317, 322 (1989). Courts consider the circumstances as a whole when making this determination. *See id.* Additionally, courts have found such seizures to have

occurred based on the physical presence and tone of voice of the police. *See id.* at 781-82, 440 N.W.2d at 323.

The officers in the instant case failed to satisfy the standard set forth in *Terry*. Neither walking down the street alone at night nor pausing briefly at an intersection is sufficient to cause suspicion that one is prostituting. During the time of the police observation, Carter did not speak to any other person, nor did she attempt to speak to anyone. Any seizure of Carter's person based on this suspicion was unconstitutional.

It was reasonable for Carter to believe she was not free to leave after the officers pulled up. She testified at the hearing on her motion that the officers pulled up, "jumped" out of their squad car, and immediately began questioning her about illegal activities. When asked whether she felt free to walk away or not speak to the officers, Carter replied, "No, I wasn't." Based on the officers' physical presence and tone of voice, Carter reasonably believed she was not free to leave.

Based on the record, this court concludes that there was not a sufficient basis for the officers to detain the appellant. The ensuing "seizure" of her person was unconstitutional and, therefore, the subsequent discovery of marijuana was inadmissible. The trial court, therefore, erred in denying Carter's motion to suppress this evidence.

By the Court.—Judgment reversed and cause remanded for further proceedings consistent with this opinion.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

